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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

THE PEOPLE OF THE STATE OF CALIFORNIA on the RELATION of SAN JOSE POLICE OFFICERS' ASSOCIATION, *Plaintiff,* v. CITY OF SAN JOSE, and CITY COUNCIL OF SAN JOSE, *Defendants.*	CASE NO. 113-CV-245503 **REPLY OF PETER CONSTANT IN SUPPORT OF APPLICATION TO INTERVENE** DATE: April 5, 2016 TIME: 9:00 A.M. DEPT: 7 JUDGE: McGowen

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I. INTRODUCTION.

As a matter of public policy, Proposed Intervenors were not required to seek intervention until they knew the City had ceased to represent their interests. (*United States v. Carpenter* (9th Cir. 2002) 298 F.3d 1122, 1125.) That happened on March 8, 2016 when the City signed a document entitled, "Stipulated Facts and Proposed Findings, Judgment and Order." (Supp. RJN, Ex. C.) Throughout negotiations with Relator, the City's public documents stated that the City's voters would vote on the repeal and replacement of Measure B. On March 8, 2016, the day before Proposed Intervenors filed their Application (See Supp. Decls. of Constant and Carson), the City revealed for the first time that it planned to completely cut the voters out of the process: the City has agreed to the stipulated invalidation of Measure B. Clearly Proposed Intervenors' Application filed the next day was timely.

The Parties also argue nobody can intervene to defend Measure B–not Measure B beneficiaries who are retirees, not voters who enacted the measure and are specially empowered by it, and not the measure's chief architect—because the City Council placed it on the ballot. Proposed Intervenors are relegated to "lobbying" against the Settlement Agreement. This is directly contrary to the law established by the California Supreme Court in *Perry v. Brown* (2011) 52 Cal.4th 1116 and other cases, which requires courts to "jealously protect" the constitutional initiative right and for voters to be represented in litigation to defend a ballot measure if the government will not do so. Intervention ensures there is a mechanism "to guard the people's right to exercise initiative power, a right that must be jealously defended by the courts." (*Id.*, at pp. 1148-1149.)

In addition, intervention will not enlarge the issues in this case, as thoroughly set forth in the Reply of Proposed Intervenors SVTA and Haug. (Reply of SVTA & Haug, at 5-6.) These Proposed Interveners also precisely demonstrate why neither the Attorney General's approval of the Parties settlement nor the ongoing PERB proceedings prevent intervention. (Reply of SVTA & Haug, at 7-10) Proposed Intervenor Constant adopts these arguments. Intervention is for this Court to decide, and it should decide in Proposed Intervenors' favor because they meet all of the criteria.

II. REPLY ARGUMENT.

A. Proposed Intervenors' Application Is Timely.

The Parties argue this application to intervene is untimely because Proposed Interveners should have applied to intervene when the settlement negotiations were made public. (Rel. Oppo. at 1:20-21 & 4:18; City Oppo. at 1:21 & 3:12-13). The City is presumed to represent the interests of its

residents and voters in litigation. Intervention is discouraged until the point in litigation it is clear the City has become the opponent of its residents' interests. In this case, that revelation occurred on March 8, 2016. The Ninth Circuit Court of Appeal restated the principle in *Carpenter*:

> We wish to encourage, not discourage, the government's participation in settlement discussions. More importantly, settlement negotiations would be severely impaired if every party that the government represents could intervene to participate as a matter of right simply because the negotiations were conducted in a confidential manner. For these reasons, we invoke the principle that until parties have notice that the government may not be representing their interests, parties are entitled to rely on the presumption that the government is representing their interests. E.g., *Forest Conservation Council*, 66 F.3d at 149 ("a presumption of adequate representation generally arises when the representative is a governmental body or officer charged by law with representing the interests of the absentee"). . .
> It was only when the intervenors learned that the settlement constituted a substantial departure from the position that the government had maintained throughout the litigation that they sought to intervene. . . In this case, the district court erred in denying appellants' motion to intervene.

(*Carpenter*, *supra*, 298 F.3d at 1124-1125, emphasis added [application for intervention one month after final settlement documents made public]; *Allen v. Bedolla* (9th Cir. 2015) 787 F.3d 1218, 1222 [*Carpenter*'s "reasoning was grounded in the need to encourage the assumption that when the government is a party, the interests of others will be protected."]; *Cohorst v. BRE Props.* (S.D.Cal. 2011) 2011 U.S. Dist. LEXIS 87342, 19-20 ["The Ninth Circuit has distinguished *Carpenter* in other decisions which denied post-settlement intervention motions involving private parties explaining 'those cases did not involve a claim of failure of government agency to represent its citizens.'"].)

Measure B, a Charter amendment, can itself be amended or repealed only by the voters with a subsequent ballot measure, or by judicial determination of its invalidity. (Cal Const. Art. XI, § 3(a); Cal. Elect. Code § 9255; (Reply of SVTA & Haug, at 9). Proposed Intervenors were entitled to presume the City would protect their constitutional right to adopt Measure B. And it seemed the City would bear up to that obligation. (Decl. of Duenas, ¶10.) Accordingly, in its March 11, 2015 letter to the unions expressing a willingness to discuss settlement, the City proposed an undefined "quo warranto strategy… that can be carried out on a timeline that would allow the Council sufficient time to pursue a 2016 ballot measure" provided the City was "satisfied that the quo warranto strategy does not impair the public interest." (City RJN, Ex. G, emphasis added.)

On July 24, 2015, when the City publicized an outline of the PF Settlement Framework, it reconfirmed the commitments made in the Mayor's March 11, 2015 letter, *supra*, including the cryptic

"quo warranto strategy", a 2016 ballot measure, and the City's commitment "that the quo warranto strategy does not impair the public interest." (City RJN, Ex. H, pp. 12&13 of 14.)

On August 17, the City publicized two addenda to the PF Settlement Framework setting forth an implementation path. The City indicated that the *quo warranto* process had not yet been initiated, many contingencies remained, but the Parties proposed "using the SJPOA quo warranto case to immediately implement the agreed-upon changes to retirement benefits and pursuing a November 2016 ballot measure." (City RJN, Ex. J, emphasis added.) Addendum #1 set forth the Parties' general agreement there would be a ballot measure, intended to include "provisions of the Settlement Framework" to "supersede Measure B". The second addendum set forth a timeline. The City's August 17, 2015 memorandum states "the parties will propose a Stipulated Judgment in the quo warranto case that Measure B should be invalidated", but prior to that "the parties will propose a stipulation to stay the implementation of Measure B while the other items in the implementation process are proceeding", which included the November 2016 ballot measure to supersede Measure B. (City RJN, Ex. J, p. 2 & Add. #2, Item #5.)

In a subsequent report dated September 4, 2015, the City explains the agreement between the Parties. The City listed numerous contingencies to finalizing the PF Settlement Framework, including settlement with all other parties to various Measure B litigation. Only after "a global settlement is reached and before the quo warranto process begins in court", the parties will agree on ballot measure language for November 2016. The September 2015 report further explains: "Implementation will require a court declaring Measure B to be void and/or the voters replacing Measure B." If this "strategy" does not result in invalidation of Measure B (presumably because the Court refuses to invalidate charter amendment without an evidentiary hearing, or the voters intervene to defend Measure B), then the entire PF Settlement Framework would be placed on the November 2016 ballot. (City RJN, Ex. K, emphasis added.)

In cold contrast to these representations about the "quo warranto strategy" tied to a ballot measure, on March 8, just one day before Proposed Interveners filed this application, it became patent the City had abandoned the interests of its voters—the resolution of this *quo warranto* action by stipulation to the invalidity of Measure B is in no way contingent on settlements with other unions or a ballot measure replacing Measure B, either one negotiated by the Parties, or the entire PF Settlement

Framework. In documents signed by the City on March 8[1] and posted to the City's website the next day, simultaneously with the filing of Intervenors' Application, the Parties stipulate to the unconditional invalidation of Measure B. (See, Supp. RJN, Ex. C.[2]) There is not one word about a ballot measure. In the City's opposition filings on March 25, it came to light for the very first time that the parties are negotiating a sham ballot measure still subject to revision. (Decl. of Duenas, ¶¶ 9&14.) But whether it passes or not, the Parties propose that this Court strike Measure B from the City's Charter without even one evidentiary hearing, paving the way for the PF Settlement Framework to spring to life.

The parties cite no case supporting denial of Proposed Intervenors' application as untimely in circumstances giving rise to the presumption the City is adequately representing Intervenors' interests. In *Allen v. California Water & Tel. Co.*(1947) 31 Cal.2d 104, 108, a case concerning water rights, the City of Coronado, waited until seven years after the trial of the action to attempt to intervene. In *Noya v. A.W. Coulter Trucking* (2006) 143 Cal. App. 4th 838, an insurance company refused the tender of defense of an action filed in 2001. The parties then litigated for several years and finally reaching a comprehensive settlement in 2005. The insurer then attempted to intervene and was denied for lack of timeliness, and also because the insurer would not be prejudiced. (*Id.*, at 841.) In contrast, this *quo warranto* action has not been litigated at all. POA suggests there have been three "hearings". (Decl. of Adam, ¶ 6.) That's an exaggeration. Those were only case management conferences. No substantive issue has yet been addressed in this case.

In *Cal. Dep't of Toxic Substances Control v. Commercial Realty Projects* (9th Cir. 2002) 309 F.3d 1113, a superfund case, certain cities attempted to intervene in the action that had been pending for six years, but after the parties reached a settlement incorporated in a Consent Decree. The Ninth Circuit upheld the district court's denial of intervention because the cities had been repeatedly and directly invited to participate in the proceedings, but they repeatedly refused. (*Id.*, at 1117-1118.) *Officers for Justice v. Civil Service Com.* (9th Cir. 1991) 934 F.2d 1092, cited by Relator, actually supports Proposed Intervenors. In *Officers for Justice*, a police officer represented by the union was entitled to intervene when, after defending an action, the union for political reasons changed its

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[1] The timing is not coincidental. Proposed Intervenor Constant, on March 7, 2016, informed the City's Mayor by telephone of his intent to seek intervention in this action. (Supp. Decl. of Constant, ¶ 3.)

[2] Relator states the documents have been filed with the Court, but there is no evidence of that on the Court's website. (Rel. Oppo. at 1:7-8; Suppl. Decl. of Carson.)

position to support a ruling adverse to the officer. (*Id.*, at 1095-1096.) In this *quo warrant* action, the City published its proposed stipulation completely cutting the voters out of the process to replace or revise Measure B on the same day as the filing of the application for intervention.

B. Constant Has A Direct Interest As A Member Of The Retirement System Measure B Was Designed To Protect.

Both parties avoid addressing Proposed Intervenor Constant's direct interest as an intended beneficiary of Measure B, which cannot be denied. According to the City, Constant is not entitled to intervene because he has no interest in the proposed settlement. (City Oppo., at 6:7-8 & 15-16.) But this case is not about the settlement. It is about the validity of Measure B, which is intended to ensure long-term stability of the City's pension system. Relator asserts this case is about the "statutory bargaining process". (Rel. Oppo., at 5:8-19.) But this is not a "cure and correct" case that Measure B will survive. Relator prays for the invalidation of Measure B. (Verified Compl. in Quo Warranto, Prayer ¶1.) Relator concedes the test is for intervention is whether Proposed Intervenors' interests will be affected by "the direct legal operation and effect of the judgment." Rel.Oppo., at 6:25.

Section 387(b) provides intervention is mandatory when the person seeking to intervene claims a significantly protectable interest relating to the "property or transaction" subject to the action. (*Siena Court Homeowners Assn. v. Green Valley Corp.* (2008) 164 Cal.App.4th 1416, 1423-1424.) Intervention is permissive when a person has a direct interest the law is "specifically designed to protect" such that the intervenor will gain or lose by the legal operation and the effect of the judgment. (*City and County of San Francisco v. State of California* (2005) 128 Cal.App.4th 1030, 1041; see also *Simpson Redwood Company v. California* (1987) 196 Cal.App.3d 1192, 1200; *People ex rel. Rominger v. County of Trinity* (1983) 147 Cal.App.3d 665, 660-661.) The purpose of intervention is to protect the interests of persons who may be affected by the judgment but who are not yet parties in the case. (*County of San Bernardino v. Harsh California Cor.* (1959) 52 Cal.2d 341, 346.)

Constant indisputably has a direct interest for intervention under either the mandatory or permissive standard. Constant is a vested beneficiary of the City pension fund, a property right. "A public employee's pension constitutes an element of compensation, and a vested contractual right to pension benefits accrues upon acceptance of employment. Such a pension right may not be destroyed, once vested, without impairing a contractual obligation of the employing public entity." (*Betts v. Board of Administration* (1978) 21 Cal.3d 859, 863.) Charters and municipal codes are valid and-enforceable-sources of vested property rights. (See *International Assn. of Firefighters v. San Diego*

(1983) 34 Cal.3d 292, 302 [charter, ordinances, and municipal codes].) As a former member of the City Council, he was also a party to the allegedly incomplete meet and confer "transaction" between the City and the unions when Measure B was placed on the ballot. The express intent of Measure B was to "ensure the City can provide reasonable and sustainable post employment benefits". (Proposed Intevenors' RJN, Ex. 1, p. 67.) As Constant's declaration provides, his interest as pension beneficiary in upholding Measure B is to ensure the long term solvency of the pension fund,[3] the very intent of the Measure. It is really irrelevant that a different reform scheme might achieve a similar result. Constant will certainly be affected by a judgment in this *quo warranto* action to overturn Measure B and install a settlement agreement that weakens the protections imposed by Measure B. Constant's interest is not speculative. (Supp. Decl. of Constant, ¶ 11.)

C. Constant Has An Interest As An Author Of Measure B.

The City erroneously states intervention in ballot measure cases is only permissible if the measure has a single author, and Constant does not qualify because he was one of eight members of the City Council that voted to place Measure B on the ballot. (City Opp., 7:8-19.) The City is mistaken. The Supreme Court in *Perry* specifically held the intervention process serves a vital role in protecting the people's constitutional right to pass an initiative, recognizing that while a local jurisdiction may have a duty to defend an initiative, it may not do so if it has underlying opposition to the law enacted by the voters. (See *Building Industry Association v. City of Camarillo* (1986) 41 Cal.3d 810, 822.) The enhanced risk of a local government not defending a law adopted by its people "is attributable to the unique nature and purpose of the initiative power, which gives the people the right to adopt into law measures that their elected officials have not adopted and may often oppose." (*Perry, supra*, 52 Cal.4th at p. 1149.) The Supreme Court reviewed numerous precedents as "broadly instructive" relating to intervention in initiative cases by initiative proponents and others. (*Perry, supra*, 52 Cal.4th at p. 1149.) The Court approved these cases determining intervention in circumstances in which the government refused to defend an initiative was authorized "as of right." (*Perry, supra*, 52 Cal.4th at p. 1163.) Proposed Intervenor Constant fulfills that role.

The Ninth Circuit has also recognized supporters of an initiative who are not its author or official proponent have a "'significant protectable interest' in defending the legality of the measure"

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[3] The City argues with Constant's example of Measure B's ability to provide for long term stability for the City's pension system. (City Oppo., at 6:22-25.) There are numerous other particulars as well, even compared to the settlement the Parties have negotiated. (Supp. Decl of Constant, ¶ 11.)

they supported. (*Prete v. Bradbury* (2006) 438 F.3d 949, 954 [quoting *Sagebrush Rebellion, Inc. v. Watt* (9th Cir. 1983) 713 F.2d 525, 528]; see also *Washington State Bldg. & Constr. Trades Council v. Spellman* (9th Cir. 1982) 684 F.2d 627, 629-630.) In *Prete*, the Oregon AFL-CIO union was "a major supporter" of a measure that prohibited paying initiative and referendum petition signature gatherers on a per signature basis, but not the proponent. (*Prete*, *supra*, 438 F.3d at pp. 952-953.) As a supporter of the initiative, the union had a "significant protectable interest" in defending the measure in subsequent litigation. (*Id.* at p. 954.) The Ninth Circuit ultimately denied the union's intervention because defendant Secretary of State was adequately representing the intervenor's interests. (*Id.* at p. 957.) The court held "the ultimate objective for both defendant and intervenor-defendants is upholding the validity of [the initiative]." (*Ibid.*)

That is not the case in this *quo warranto* action. Here, the "ultimate objective" of the City is to invalidate Measure B. This is exactly the type of situation the California Supreme Court warned against in *Building Industry Association* and *Perry*: far from defending Measure B "with vigor," the City has retreated into settlement discussions and stipulations to invalidate it, subordinating the rights of the voters to other interests. Under the City's misinterpretation of *Perry*, voters who enact charter amendments placed on the ballot by a city council would be completely without a remedy when the political winds change and a subsequent council finds the charter amendment politically inconvenient. Even though Measure B may not have had an official proponent or author, the City does not deny Constant was on the City Council and worked closely with city staff to draft the measure, voted to place Measure B on the ballot, and actively campaigned in favor of its passage. Voters would be well served by having Constant represent their interests now that the city has abandoned its defense.

In reference to the California cases cited in Proposed Intervenors moving papers that have also permitted intervention by a variety of legislative authors, sponsors, local interest groups, and initiative supporters, the City claims, citing *City and County of San Francisco v. State of California* (2005) 128 Cal.App.4th 1030, 1042 that these cases are not authoritative because they do not address the propriety of intervention. To the contrary, at a minimum these cases show that intervention of all manner of defenders of initiative legislation is uncontroversial. Moreover, such intervention is in complete accord with the policies articulated in *Perry,* which was decided after *CCSF* and confirmed the right of voters to be represented when the government refuses to defend a ballot measure. Although *Perry* focuses specifically on the proponents of a statewide measure stepping in the shoes of the government to mount a defense, the rights of local voters to have their charter amendment

measure defended, even when there is no official author or proponent, is identical. *CCSF* is further distinguishable because the organization seeking intervention in that case was formed *after* the initiative had passed and they played no role in the campaign. (*Id.* at p. 1038.) The Attorney General also led the charge in defending the underlying measure at issue. (*See Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1072-1073.) In contrast, the City has abandoned its defense of Measure B. Peter Constant was involved with Measure B from the very beginning, and the City does not contest his centrality to the development of the measure.

D. Proposed Intervenor Constant Has A Reputational Interest That Provides Additional Justification For His Intervention.

The City and the POA argue Constant's reputational interests are insufficient to justify his intervention. (City Oppo.,at 8; POA Oppo., at 6.) POA cites a trio of federal cases, *Floyd v. City of New York* (8th Cir. 2007) 485 F.3d 1006, 1008, *Edmondson v. State of Nebraska* (8th Cir. 1967) 383 F.2d 123, 127, and *Sierra Club v. United States Army Corps. of Engineers* (2nd Cir. 2014) 770 F.3d 1051, 1060-1061 as examples of intervention being denied on reputation claims alone. The City cites *CCSF*, noting that in *Simpson Redwood Co. v. State* (1987) 196 Cal.App.3d 1192 and *People ex rel. Rominger v. County of Trinity* (1983) 147 Cal.App.3d 655, reputational and tangible interests combined to justify intervention. That is exactly the case here, where Constant's tangible interest as a beneficiary of the pension fund is buttressed by his reputational interest as a nation-wide pension reform advocate based on his experience in drafting and successfully advocating for Measure B.

E. The Parties' Will Not Be Prejudiced: Their Interest In Eliminating Measure B Does Not Outweigh Intervenor's Constitutional Right To Amend The City Charter.

Citing declarations by various city officials and POA executives, the City and the POA argue that the stipulated invalidation of Measure B is a prerequisite to retention of police officers and the commencement of cooperative recruitment efforts for police officers (City Oppo., at 12:22-13:11; Rel. Oppo., at 8:4-11), terminating other litigation (*Id.*, at 12:12-17), and ensuring a 2016 ballot measure (Rel. Oppo., at 8:11-13.) They argue these goals outweigh the constitutional charter amendment rights of the voters and who passed Measure B and retirees, like Constant, Measure B's intended beneficiaries. (City Oppo., at 13; POA Oppo.,. at 8.) None of the asserted interests outweigh the constitutional rights of San Jose's voters to amend their City Charter and the persons intended to be protected by that amendment. The Parties will not be prejudiced by intervention.

Relator brazenly admits the elimination of Measure B is a prerequisite to its cooperation with the City in a robust police recruitment program to rebuild the force. (Decl. of Gonzalez, ¶ 6.) There is no way destruction of San Jose voters' constitutional rights is a fair trade for Relator's cooperation. While the City tags Measure B as a factor in its inability to retain and recruit police officers after it was enacted, it states there were other "outside factors" as well and current budgeting has had an impact. (Decl. of Garcia, ¶¶ 6&10.) Also, the Parties do not contend elimination of Measure B is the only way to attract police officers to the City. (See Supp. Decl. of Constant, ¶¶ 6&8.)

Terminating litigation to defend Measure B could not possibly be a sufficient interest to exclude Proposed Intervenors from this action. The City is obligated to defend its laws and Proposed Intervenors' interests, including those arising from measures enacted under the peoples' constitutional power of initiative and charter amendment. (*Perry*, *supra*, 52 Cal.4th at p. 1149; *Building Industry Association v. City of Camarillo, supra,* 41 Cal.3d at p. 822.) The City disingenuously argues Proposed Intervenors should not care because the "Settlement Framework leaves much of Measure B intact." The City offers no support for this bald statement, which on its face is inaccurate. Measure B is enshrined in the City's Charter and subject to change only by the voters; the settlement framework is an agreement, subject to change as the political winds blow.

Finally, permitting intervention will not prevent the City from placing a measure on the ballot asking the voters if they wish to replace Measure B with the PF Settlement Framework. The deadline for placing measures on the November 2016 ballot is August 12, four and one-half months away (Decl. of Duenas, ¶ 15; Elec. Code § 10403(a).) The Parties have already agreed that, if their "quo warranto strategy" to stipulate to the invalidation of Measure B fails for any reason, which could include the intervention of people and entities who want to defend Measure B, this action will be stayed and the entire PF Settlement Framework will be placed on the ballot: "[I]f the process of quo warranto does not permit the replacement of Measure B with this or any other agreement, the City Council, Local 230 and the POA shall request a stay of all Measure B litigation to which they are involved in to permit this agreement to appear on a 2016 ballot as a measure to replace Measure B in its entirety." (City RJN, Ex. I.)

In *Rominger*, *supra*, 147 Cal.App.3d at p. 659, the Sierra Club intervened in a case where the state claimed certain Trinity County ordinances controlling the use of herbicides and pesticides were preempted by state law. The Sierra Club and its members supported the ordinances and sought intervention to protect against chemical spraying resuming in the County. (*Id.* at p. 662.) Holding

that the State and the County's interests in litigating the case on their own terms did not outweigh the Sierra Club's intervention interest, the court ruled the County's interest in defending its jurisdiction against the State did not outweigh interests of the Sierra Club and its members, as direct beneficiaries of the ordinances to protect their own health and well-being. (*Id.* at p. 665.)

Similar to the County in *Rominger*, the City and POA's core interest in this case boils down to protecting their prerogatives with regard to the City's pension system free of the inconvenience of needing voter approval. Measure B fundamentally altered this process by requiring future pension changes to be approved by the voters. As the Supreme Court held in *Perry*, intervention protects the voters' rights to the initiative process and helps ensure fairness when initiatives are challenged in court but not vigorously defended by the government. Upon granting intervention in *Rominger*, the appellate court also recognized intervention is designed to project the people whose rights are specifically affected by a case, but are ignored by the government parties to the action:

> Any argument that the parties should be permitted to litigate without the "interference" of the very people those ordinances were designed to protect is an unacceptable assertion of bureaucratic dominion and control to the exclusion of the citizenry.

(*Id.* at p. 665.)

Measure B was passed by nearly 70% of the voters in San Jose. Ignoring the policy balance struck by the votes, the City and the POA seek to substitute for Measure B a negotiated settlement without allowing the voters to approve or disapprove the change. The City posits the PF Settlement Framework is just as beneficial as Measure B, so Proposed Intervenors have nothing to worry about. (City. Oppo, at 12:17-21, 13:12-14). Whether the PR Settlement Framework is in any way preferable to Measure B is for the voters of San Jose to decide as a matter of law. (Reply of SVTA & Haug, at 9-10.)

III. CONCLUSION.

The application for intervention should be granted.

Respectfully submitted,

Dated: March 28, 2016

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